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No. 00-665

In the
Supreme Court of the United States

JOSE MONTEMAYOR, COMMISSIONER OF THE TEXAS DEPARTMENT OF INSURANCE; JOHN CORNYN, ATTORNEY GENERAL OF TEXAS,

Petitioners,

v.

CORPORATE HEALTH INSURANCE, INC.;
AETNA HEALTH PLANS OF TEXAS, INC.;
AETNA HEALTH PLANS OF NORTH TEXAS, INC.;
AETNA LIFE INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF THE STATES OF MASSACHUSETTS, ALABAMA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, ILLINOIS, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW MEXICO, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, UTAH, VERMONT AND WASHINGTON, AND THE NORTHERN MARIANA ISLANDS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE

The 24 amici curiae states, through their attorneys general, respectfully submit this brief in support of the petition for writ of certiorari filed by the state of Texas. The states have a strong interest in protecting state insurance laws from being preempted by the Employee Retirement Income Security Act of 1974 (ERISA). Moreover, the states have an interest in protecting their ability to enforce state insurance laws that have a direct impact on their citizens' health under managed health care systems. The protection secured by the state statute at issue in this case is widely considered an important and effective safeguard in preventing underutilization by managed care organizations ("MCOs").[1]

Most state citizens' health care insurance is purchased through their employers and utilizes some form of managed health care.[2] Managed care organizations act as both a health care provider and health care insurer. Utilization review has become a fundamental component of managed care. The general purpose of health management organizations, eighty-two percent of which were for profit institutions in 1996, is to attempt to contain costs and increase profits through utilization review.[3] There is a natural tendency within the managed care

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[1]Geraldine Dallek and Karen Politz, Institute for Health Care Research and Policy, Georgetown University *External Review of Health Plan Decisions: An Update*. (May 2000) at 6 [hereinafter *External Review Update*].

[2]Recent statistics show that 75% of all Americans with health insurance have managed care provisions. *See* Sandra Kaufmann Battaglia, *Managed Care or Managed Costs?* 18 Delaware Lawyer 21 (2000).

[3] Mark O. Hielper & Brian C. Dunn, *Irreconcilable Differences: Why the Doctor-Patient Relationship is Disintegrating at the Hands of Health Maintenance Organizations and Wall Street*, 25 Pepp. L. Rev. 597, 603-04 (1998).

environment to limit care and to provide the least expensive care available. When MCOs override a physician's decision regarding the medical necessity of a treatment or procedure, the patient will likely choose not to undergo the treatment or procedure. If states are not able to regulate the utilization review processes of managed care organizations, then they will not be able to ensure that their citizens receive necessary health care services.

The state of Texas sought to safeguard the health of its citizens by enacting a statute providing for external review of medical decisions in situations where an MCO has denied a proposed medical treatment as not "medically necessary." Thirty-eight other states and the District of Columbia are also concerned about the impact MCO's utilization review decisions have on their citizens' health and have established some form of external review.[4] The validity of these statutes and the

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[4]2000 Alaska Sess. Laws 99; ARIZ. REV. STATE. ANN. § 20-2537 (West Supp. 1999); CAL. [INS.] CODE § 10169 (West Supp. 2000); COLO. REV. STAT. §10-16-113.5 (West 1999); CONN. GEN. STAT. § 38A-478N (West Supp. 2000); DEL. CODE ANN. Tit. 16, § 9119 (2000); D.C. Code § 32-571.7 (Lexis Supp. 2000); FLA. STAT. ANN. § 408.7056 - 57 (West 2000); GA. Code ANN. § 33-20a-32 (2000); 2000 Haw. Sess. Laws 250; 215 ILL. COMP. STAT. 125/4-10 (West Supp. 2000); IND. INS. CODE ANN. § 27-13-10.1-1 (West 2000); IOWA CODE ANN. § 514J (West 2000); KAN. STAT. ANN. § 40-22A13 (SUPP. 1999); 2000 Kentucky Laws Reg. Sess. 262 (West); LA. REV. STAT. ANN. §22:3081 (2000); 2000 Me. Legis. Serv. 742 (West); MD. CODE ANN. [INS.] §§ 15-10A through 15-10B (Lexis Supp. 1999); 2000 Mass. Legis. Serv. 141 (West); 2000 Mich. Legis. Serv. 251 (West); MINN. STAT. ANN. § 62q.73 (West Supp. 2000); MO. REV. STAT. § 376.1385 (1997); MONT. CODE ANN. §33-37-102b (1999); N.H. REV. STAT. ANN. 420-J:5 (2000); N.J. STAT. ANN. §§ 26:2S-11, 26:2S-12 (West Supp. 2000); N.M. ADM. CODE tit. 13, § 10.17.24 (Michie Supp. 2000); N.Y. [INS.] LAW §§ 4904 (McKinney 1999); N.C. Gen. Stat. §§ 58-50-61, 58-50-62 (1998); OHIO REV. CODE ANN. § 1751.84

ability of states to pass similar statutes is at issue in this case. The states have a vital interest in their ability to protect the public health through the regulation of insurance companies.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case turns on the construction and application of §514 of ERISA to Senate Bill 386, which amended the Texas Insurance Code to provide for a binding, independent physician review of adverse medical necessity determinations made by managed care organizations ("IRO process"). The Fifth Circuit specifically held that the IRO process regulates insurance within the meaning of the savings clause and thus is precluded from preemption. However, in reliance on *Pilot Life v. Dedeaux*, 481 U.S. 41 (1987), the court held that to the extent the law binds an insurer to the decision reached in the independent review, the law is preempted by ERISA §502(a). The offending provisions were severed from the Act. This case presents critical issues regarding the states' ability to regulate health care and insurance, two areas of traditional state oversight. The Fifth Circuit erroneously interpreted *Pilot Life* to mean that the savings clause does not operate if a law provides an alternative remedy for obtaining ERISA benefits. The error resulted from the court's failure to distinguish *Pilot Life* on its facts and to follow applicable authority, such as *UNUM Life Ins. Co. of Am. v. Ward,* 526 U.S. 358 (1999). In addition, the Fifth Circuit's decision conflicts with decisions of

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(Baldwin Supp. 2000); OKLA. STAT. ANN. Tit. 63, § 2528.3 (West 1999); 40 PA. CONS. STAT. §§ 991.2161 *et seq.* (1998); R.I. GEN. LAWS § 23-17.12-10 (Lexis Supp. 2000); 2000 S.C. Acts 380; TENN. CODE ANN. § 56-32-227 (West 1999); UTAH CODE ANN. §31A-22-629 (2000); VT. STAT. ANN. tit. 8, §4089f (1998); VA. CODE § 38.2-5900 to 38.2-5905 (Michie Supp. 2000); 2000 Wash. Legis. Serv. 5 (West); 2000 Wisc. Legis. Serv. 155 (West).

several of its fellow circuits. This conflict among the circuits cannot be resolved without this Court's intervention. Thus, this Court should issue its writ of certiorari to clarify the issues raised in this case and resolve the conflict among the circuits regarding ERISA preemption.

ARGUMENT

I. THIS CASE CONCERNS VITAL ISSUES REGARDING THE STATES' ABILITY TO PROTECT MANAGED CARE CONSUMERS.

This Court should grant certiorari because utilization review laws are critical to the states' oversight of managed care organizations. The Fifth Circuit's interpretation of the savings clause would eliminate the states' ability to effectively regulate health insurance under managed care. Utilization review is one of the central mechanisms used to contain costs under managed care. Utilization review organizations "have mixed clinical and financial functions."[5] Their decisions regarding pre-authorization for high cost medical procedures are widely used by MCOs to reduce costs. *Id.* These decisions concern the unique intersection between quality of care and cost of care, or payment for care through insurance. These two compelling concerns have been historically regulated by the states.

The states have traditionally regulated health care and the business of health care providers. Quality of care is an area of established state regulation--and, in the era of MCOs, of necessary state regulation--and nothing in ERISA indicates that

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[5] Peter D. Jacobson, *Legal Challenges to Managed Care Cost Containment Programs: An Initial Assessment*, Health Affairs (July - August 1999).

"Congress chose to displace general health care regulation."[6] In addition, this Court has recognized that by including the savings clause in ERISA, Congress intended to reserve to the states the right to regulate insurance, another area of traditional state regulation.[7] Therefore, the states should be able to regulate the utilization review process because it concerns two pivotal areas of state regulation -- health care quality and the business of insurance.

Utilization review laws are a matter of profound public concern because they are an effective consumer protection mechanism.[8] They serve an essential function in addressing consumers' concerns regarding underutilization by managed care organizations and reducing litigation over health care decisions. A recent Georgetown University Study[9] found that external utilization review programs are cited as having a sentinel effect on health plans. Furthermore, the study also found that such external utilization review programs are regarded as valuable and fair, with health plan representatives suggesting that such programs helped improve public perceptions about managed care.[10] External reviews are

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[6] *New York Conference of Blue Cross & Blue Shield Plans v. Travelers*, 514 U.S. 645, 654-55 (1995).

[7] *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985).

[8] ERISA was enacted to protect consumers--"'to promote the interests of employees and their beneficiaries in employee benefit plans,' ...and 'to protect contractually defined benefits'", *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 113 (1989); *see also* 29 U.S.C. § 1001(b)--and is thus consistent with state consumer protection regulation and remedies.

[9] *External Review Update* at 6.

[10] *Id.*

generally considered universally beneficial to the overall quality of health care in this country.[11] Notably, states with external review laws find that health plans' decisions are overturned in approximately half of the cases reviewed.[12] This reversal rate demonstrates that these laws have a significant impact on the public health.

State legislatures have addressed their citizens' concerns regarding the utilization review process by passing statutes guaranteeing consumers the right to appeal adverse determinations regarding medical decisions to impartial external reviewers. If these laws are not applicable to fully-insured ERISA plans, as the Fifth Circuit held, then the states will be unable to address this crucial concern of their citizens. This Court should grant the petition for writ of certiorari because this case concerns key matters regarding states' rights to regulate health care quality and insurance, areas of historic state regulation.

II. THE FIFTH CIRCUIT MISINTERPRETED *PILOT LIFE* AS REQUIRING PREEMPTION OF SAVED STATE LAWS THAT PROVIDE A STATE LAW CAUSE OF ACTION OR REMEDY.

Although the Fifth Circuit concluded that the IRO process was saved from express preemption by the savings clause, its analysis did not end there. The court also considered whether the IRO process was preempted by §502(a). This analysis was compelled, the court reasoned, by *Pilot Life v. Dedeaux.* The

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[11] Anne Cramer and Erin O'Brien Ide, *The Evolution of Consumer Rights Against Health Plans: External Appeal Process Mandates*, 25 - Vt. B.J. 45 (1999).

[12] *External Review Update, supra* at 5 .

Fifth Circuit noted that in *Pilot Life,* this Court "interpreted Congress's intent regarding the exclusivity of ERISA's enforcement scheme very broadly, concluding that the scheme preempts not only directly conflicting remedial schemes, but also supplemental state law remedies. Thus, the savings clause does not operate if the state law at issue creates an alternative remedy for obtaining benefits under an ERISA plan." *Corporate Health,* 215 F.3d 526, 538-39 (5th Cir. 2000), citing *Pilot Life,* 481 U.S. 41 (1987). The court's reliance on *Pilot Life* is misplaced.

A. *Pilot Life* Did Not Involve a State Law Saved by §514(b).

At issue in *Pilot Life* were common law tort and contract claims premised upon the Mississippi law of bad faith. More specifically, the complaint alleged claims for tortious breach of contract, breach of fiduciary duties, and fraud in the inducement. 481 U.S. at 43. The complaint sought extra-contractual damages for failure to pay benefits due under an ERISA regulated plan resulting from improper processing of the petitioner's benefit claim. *Id.* at 48. This Court noted that there was "no dispute that the common law causes of action asserted . . . 'relate to' an employee benefit plan" and that the actions, "each based on alleged improper processing of a claim for benefits under an employee benefit plan, undoubtedly meet the criteria for preemption under §514 (a)." *Id.* at 47. "Unless these common law causes of action fall under an exception to §514 (a), therefore, they are expressly pre-empted." *Id.* at 47-48. Dedeaux argued that the Mississippi law of bad faith was a law regulating insurance; thus the claim for tortious breach of contract, which was premised upon that law, was saved from

preemption by §514(b).[13] The question was whether the action came within the savings clause.

This Court concluded that the Mississippi law of bad faith was not a law that regulates insurance. The law did not regulate insurance under a "'common-sense view' of the language of the savings clause itself" because it was not specifically directed at the insurance industry. *Id.* at 50. Rather, the law was derived from general principles of tort and contract law and applied to the breach of any contract, not just insurance contracts. *Id.* at 49-50. In addition, the McCarran-Ferguson Act factors used to identify the business of insurance also failed to support Dedeaux's assertion that the Mississippi law was a law regulating insurance. *Id.* at 50. The conclusion that the action was premised upon a state law expressly preempted by §514(a) and not saved by §514(b) was sufficient to dispose of the case.[14] However, this Court proceeded to consider the United States' contention that the claims were preempted by ERISA's civil enforcement provisions.

Pilot Life's analysis of §502(a)'s preemptive force adopted the Solicitor General's argument, made on behalf of the United States as *amicus curiae.* "The Solicitor General, . . . , argues that Congress clearly expressed an intent that the civil

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[13]Although the complaint contained three counts, the petitioner described only the count for tortious breach of contract (referred to in the respondent's brief as the Mississippi law of bad faith) as being precluded from preemption by §514(b). 481 U.S. at 48.

[14]Because of this, the discussion of §502(a)'s preemptive force is dicta. As the Solicitor General noted in the brief filed in *Unum v. Ward,* "[t]hat portion of *Pilot Life's* rationale is, however, in significant tension with the text of the insurance savings provision and was unnecessary to *Pilot Life's* holding that the law at issue there was not in any event an insurance regulation . . . ." Brief for the United States at 20.

enforcement provisions of ERISA §502(a) be the exclusive vehicle for actions . . . asserting the improper processing of a claim for benefits, and that varying state causes of action for claims within the scope of §502(a) would pose an obstacle to the purposes and objectives of Congress. *We agree.*"[15] *Id.* at 52 (emphasis supplied).

The Solicitor General reasoned that §502(a)'s structure and its legislative history demonstrated Congress' intent for ERISA's remedies to be exclusive. This Court agreed, noting that Congress had "declared that the pre-emptive force of §502(a) was modeled on the exclusive remedy provided under §301 of the Labor Management Relations Act [LMRA]." *Id.* at 52, 54 (citation omitted.) However, it is imperative to note, as this Court does in *UNUM v. Ward,* that the Solicitor General has clarified its position on the preemptive force of §502(a). This clarification sheds light on why the Fifth Circuit erred in modeling its analysis of a state law directed specifically at the insurance industry on *Pilot Life's* analysis of a state law of general application.

In *UNUM v. Ward*, the insurer, relying on *Pilot Life*, argued that the state law was preempted by §502(a). This Court observed that the Solicitor General disagreed with the insurer's position. "Noting that 'LMRA Section 301 does not contain any statutory exception analogous to ERISA's insurance savings provision,' the Solicitor General now maintains that the discussion of §502(a) in *Pilot Life* 'does not itself require that a state law that 'regulates insurance,' and so comes within the terms of the savings clause, is nevertheless preempted if it provides a state-law cause of action or remedy.' " *UNUM v. Ward*, 526 U.S. at 377 n7 (quoting Brief of the United States at 25). This Court, however, declined to revisit *Pilot Life* because

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[15]Citing Brief for the United States at 18-19.

the action in *Ward* was brought under §502(a) of ERISA and sought a remedy under ERISA. Thus, the issue of §502(a)'s preemptive force was not presented. 526 U.S. at 376. However, the discussion of the Solicitor General's clarification of its position in *Pilot Life* suggests this Court might revisit *Pilot Life* in an appropriate case.[16] *Corporate Health* is such a case.

B. The Fifth Circuit's Decision Conflicts with *UNUM v. Ward.*

The Fifth Circuit ignored this Court's decision in *UNUM v. Ward,* a decision requiring a different analysis and a different outcome. The IRO process allows an insured to seek an external, independent review of an insurer's determination that a covered health care service is medically unnecessary. The Fifth Circuit readily acknowledged that the Texas law regulated insurance and was thus saved from preemption by the savings clause. However, the Fifth Circuit characterized the process as "an alternative mechanism through which plan members may seek benefits due them under the terms of the plan--the identical relief offered under §1132(a)(1)(B) [§502(a)(1)(B)] of ERISA." Relying on *Pilot Life*, the court concluded that "the independent review provisions conflict with ERISA's exclusive remedy and cannot be saved by the savings clause. *Id.* This holding was not required by *Pilot Life* and is in contrast to the position of the

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[16] "That case [*Pilot Life*] concerned Mississippi common law creating a cause of action for bad faith breach of contract, law . . . not saved from ERISA preemption. *In that context,* the Solicitor General . . . urged the exclusivity of § 502(a) . . . and observed that § 502(a) was modeled on the exclusive remedy provided by § 301. . . . *The Court agreed with the Solicitor General's submission.*" *Ward*, 526 U.S. at 377, n7 (citing *Pilot Life*, 481 U.S. at 52-56) (emphasis supplied).

U.S. Department of Labor.[17] Moreover, it conflicts with this Court's decision in *UNUM v. Ward.*

At issue in *UNUM v. Ward* was the California notice-prejudice rule. The notice-prejudice rule required an insurer to pay claims for benefits that were filed late unless the insurer demonstrated that it was prejudiced by the late filing. The insurer UNUM contended that even if the notice-prejudice rule was saved from preemption by the §514 savings clause, it was nevertheless preempted because it conflicted with §502(a) of ERISA. According to UNUM, §502(a) preempted any action for recovery of plan benefits brought under state rules, such as the notice-prejudice rule. *UNUM v. Ward,* 526 U.S. at 376.

This Court rejected UNUM's position, noting that the action had actually been brought under §502(a) and that the notice-prejudice rule merely supplied the rule of decision in the action. *Id.* at 377. Just as application of the notice-prejudice rule did not transform the §502(a) proceeding into a state cause of action for denial of benefits in *Ward,* application of the decision reached in the IRO process as the rule of decision in a §502(a) action would not transform the proceeding into a state cause of action for denial of benefits.

The Fifth Circuit also failed to consider this Court's analysis of UNUM's argument that the notice-prejudice rule conflicted with §503 of ERISA and related regulations because it allowed a longer period for filing a claim than required by the federal law. 526 U.S. at 377.[18] This Court was not persuaded

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[17]The U.S. Department of Labor filed an amicus brief in *Corporate Health* arguing that the IRO provisions did not conflict with § 502 of ERISA and were not preempted.

[18]UNUM argued that this conflicted with ERISA's "detailed, exclusive provisions governing the filing and processing of ERISA claims," and that

by UNUM's argument. "By allowing a longer period to file than the *minimum* filing terms mandated by federal law, the notice-prejudice rule complements rather than contradicts ERISA and the regulations." *Ward* at 377, citing Brief for United States as *Amicus Curiae* 19 n. 9. Similarly, the Texas IRO process, by mandating a review process that exceeds the *minimum* review mandated by federal law, complements rather than contradicts ERISA and the regulations.[19] It it worth noting that the notice-prejudice rule and the IRO process may have a similar impact on an ERISA plan. In both instances the insurer could be bound to pay a claim it would otherwise have avoided. However, under this Court's decision in *Ward,* neither state law conflicts with ERISA's civil enforcement scheme. The Fifth Circuit's inconsistent decision should be reviewed by this Court.

ERISA's enforcement scheme would be "'completely undermined if ERISA-plan participants' . . . could use state law doctrines to obtain benefits contrary to the plan's written terms and ERISA's civil enforcement scheme." Petition for Certiorari at 25, quoting from *Pilot Life v. Dedeaux,* 481 U.S. at 54.

[19]ERISA requires plans to provide notice and the opportunity for review of denied claims. §503 of ERISA, 29 U.S.C. §1133. In the implementing regulations, the Department of Labor merely "sets out certain *minimum* requirements for employee benefit plan procedures pertaining to . . . review of claim denials." 29 C.F.R. § 2560.503-1(a) (emphasis added).

III. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE SEVENTH, SECOND AND THIRD CIRCUITS.

A. The Seventh Circuit Held that the IRO Provisions Did Not Conflict With a Substantive Provision of ERISA.

The Fifth Circuit's decision conflicts with a recent decision of the Seventh Circuit. The Seventh Circuit considered the Illinois independent review law, a law similar to the Texas law. The Illinois law requires that health maintenance organizations ("HMOs") provide a mechanism for independent review of treatment decisions regarding medical necessity.[20] *See* 215 Ill. Comp. Stat. Ann. 125/4-10 *et seq*. (West Supp. 2000). The court held the Illinois law was not preempted by ERISA because the Illinois independent review law fell within the ERISA savings clause. *Moran v. Rush Prudential HMO*, 2000 WL 1551659. The court was also satisfied that the law did not conflict with § 502(a) as it "is not tantamount to the relief offered under § 502(a)(1)(B)." *Id.* at *11. Instead, the independent review law "simply adds to the contract, by operation of law, an additional dispute resolving mechanism . . ." *Id.*

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[20]In *Moran*, the plaintiff's primary care physician recommended a specific surgery, but her HMO (Rush Prudential) decided the procedure was not medically necessary and authorized a less expensive surgery to be carried out by one of its affiliated doctors. 2000 WL 1551659 at *2. The plaintiff proceeded with the surgery recommended by her physician and afterwards sought to enforce her rights in state court under the Illinois independent review law. *Id.* at *3. Rush Prudential removed the action to federal district court on ERISA preemption grounds. *Id.* at *4.

The Seventh Circuit was correct in finding no substantive conflict between the IRO provisions and ERISA. The IRO process does not provide the identical relief offered under § 502 (a). ERISA does not expressly (or implicitly) guarantee a right to independent review of medical necessity determinations. There was no basis for the Fifth Circuit's conclusion that the Texas law conflicts with ERISA because it provides the same relief offered under § 502(a). *Corporate Health*, 215 F.3d at 539. The Seventh Circuit's decision in *Moran* is in direct conflict with the Fifth Circuit's decision in *Corporate Health* on this point.[21] The Supreme Court should grant a writ of certiorari in order to resolve the conflict between the Fifth and Seventh Circuits.

B. The Second and Third Circuits Have Correctly Held That State Insurance Laws Can be Enforced in State Court Actions.

The Second and Third Circuits have not interpreted *Pilot Life* as a bar to saving state insurance laws from preemption or an obstacle to enforcement of those laws. In *Franklin H. Williams Ins. Trust v. Travelers Ins. Co.*, 50 F.3d. 144 (2nd Cir. 1995), the Second Circuit appropriately distinguished *Pilot Life* and other cases by finding that those decisions "involve statutes that, while impacting on the insurance industry, are based upon general contract and tort principles." *Id.* at 150.

The state law at issue in *Williams Trust* required that interest on proceeds of a life insurance policy be computed

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[21]The Seventh Circuit recognized that their decision conflicted with the opinion of the Fifth Circuit in *Corporate Health*, and therefore circulated the decision among all judges of the court to determine whether to rehear the case *en banc*. The Seventh Circuit voted not to rehear the case *en banc*. The dissent noted that "[t]he panel's decision creates a square conflict . . ." with the Fifth Circuit. 2000 WL 1551659 at *13.

from the day of death. *Id.* at 146. The Second Circuit followed this Court's reasoning in *Metropolitan Life* and applied a "common sense test" to the state law. Quoting *Metropolitan Life*, the Second Circuit said simply that "to state the obvious, [the state law] regulates the terms of certain insurance contracts, and so seems to be saved from preemption by the savings clause as a law 'which regulates insurance.'" *Id.* at 149, (citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 740.

The Second Circuit found that the state law at issue was similar to the statute addressed in *Metropolitan Life* "and [was] precisely the type of statute Congress intended to save from ERISA preemption." *Id.* In *Metropolitan Life* the statute at issue provided for a substantive right to mental health care and in *Williams Trust* the statute regulated the payment of interest on benefits - both laws having similar effects as the independent review law at issue here. The Second Circuit further held that ERISA was not the sole means of enforcing the state law, as "[i]t would be quixotic to rule that a claim under a state statute that is saved from preemption ... may nonetheless be enforced only via ERISA provisions and remedies."[22] *Id.* at 151. If the savings clause precludes preemption of a state insurance law, then it follows that both the substantive state law and the state law remedial measures required to give the law effect are saved.

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[22]The Solicitor General supports this view. In clarifying the position taken in *Pilot Life*, the Solicitor explained that Congress "clearly intended the remedial provisions of ERISA to be exclusive of any *generally applicable* state-law remedies related to ERISA plans. It does not follow, however, that ERISA Section 502 should inform the preemption inquiry to the same extent with respect to a state law cause of action or remedy that specifically 'regulates insurance' . . . . In that situation Congress has saved state substantive law, and it is not clear why Congress would have wanted to foreclose all access to state-created remedies or sanction to enforce that substantive law . . . ." Brief for the United States in *UNUM v. Ward* at 22.

The Third Circuit in *Pas v. Travelers Ins. Co.*, 7 F.3d 349 (3rd Cir. 1993), held that a state law providing a remedy for discrimination against certain handicapped persons (in insurance contracts) was not preempted by §502(a). Travelers argued that the state law was preempted because it created a cause of action that conflicted directly with the federal cause of action under ERISA § 502(a). *Id.* at 356. The Third Circuit analyzed whether there was an actual conflict between ERISA and the state law. The court observed that preemption occurs when a state law "purports to provide a remedy for the violation of a right expressly guaranteed by [a section of ERISA] and exclusively enforced by §502(a) [of ERISA.]." *Pas*, 7 F.3d at 356 (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 145 (1990). Because ERISA does not expressly guarantee the right provided under the New Jersey law, the court concluded that a "necessary requirement" for conflict preemption was missing. *Id.*

The Second and Third Circuit's reasoning is correct. The express preemption scheme in ERISA should be applied. Under a plain reading of the statute, § 502 is subject to the savings clause. The savings clause provides that "nothing in this subchapter [which includes § 502] shall be construed to exempt or relieve any person from any law of any State which regulates insurance..." 29 U.S.C. § 1144(b)(2)(A). Therefore, § 502 should not be construed to invalidate state insurance laws. Furthermore, the IRO provisions do not conflict with any substantive provisions of ERISA. Instead, they compliment ERISA by specifying minimal qualifications - such as being independent of the health plan - that a person making the final decision regarding whether a treatment is medically necessary

must have. Therefore they serve the same purpose as ERISA, that is to protect beneficiaries in employee benefit plans.[23]

The Fifth Circuit's decision is in direct conflict with the Second and Third Circuits' decisions on this issue. The *Pas* court acknowledged that other appellate court decisions conflict with its interpretation, which merely emphasizes the need for clarification of the scope of § 502(a) by this Court.

IV. CIRCUITS HOLDING THAT STATE INSURANCE LAWS MAY ONLY BE ENFORCED IN A § 502(a) PROCEEDING ARE INCORRECT.

Several Circuits have incorrectly interpreted *Pilot Life* to require state insurance laws to be enforced through a § 502 action under ERISA. This was the Seventh Circuit's conclusion in the *Moran* case. The court concluded that although §502(a) did not preempt the Illinois independent review law, §502(a) was the "sole launching ground" for claims arising from the Illinois independent review law. 2000 WL 1551659 at *11.

The Sixth, Eighth and Ninth Circuits have similarly held that state insurance laws may only be enforced in a §502 proceeding. In *Ruble v. UNUM Life Ins. Co.*, the Sixth Circuit stated, "Regardless of how Michigan's insurance code might have modified the terms of the UNUM insurance policy, however, any action brought by a beneficiary to enforce the policy as so modified could only be brought under §502 of ERISA." 913 F.2d 295, 297 (6th Cir. 1990) (citation omitted). And the Eighth Circuit in *Donatelli v. Home Ins. Co.*, 992 F.2d

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[23] "In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds." *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989).

763, 764-65 (8th Cir. 1993), held that the Missouri "suicide law" could not be enforced by way of a state-law breach of contract action, but it could be asserted in a §502(a) proceeding as governing the interpretation of the insurance policy's terms concerning payment of claims in cases of suicide. In *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489, 493-94 (9th Cir. 1988), the Ninth Circuit held that a provision of the California Insurance Code providing for compensatory and punitive damages arising from delay in claims payment was preempted by ERISA pursuant to *Pilot Life*, even if the law was a law regulating insurance under the savings clause.

Circuits that have held that insurance statutes may only be enforced through a § 502(a) action are incorrect. These courts have misconstrued this Court's holding in *Pilot Life*. The savings clause explicitly states Congress's intent to save from preemption state insurance laws that relate to an ERISA plan. Nothing in the language of the savings clause, or in the legislative history, suggests that Congress intended that state insurance laws may be enforced only in a §502 (a) proceeding. The Fifth Circuit's decision presents an opportunity for this Court to address this issue.[24] The interplay between the savings clause in §514 and the civil enforcement provisions in §502 is the subject of increasing conflict among the circuits. The petition for certiorari should be granted so that this Court can bring clarity to a matter of national importance.

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[24]In *Ward*, this Court declined to address the insurer's argument that §502 (a) is the "sole launching ground" for an action to enforce a saved state insurance law because the action was brought under §502(a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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